

AMENDED IN SENATE APRIL 13, 2004

AMENDED IN SENATE APRIL 1, 2004

**SENATE BILL**

**No. 1821**

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**Introduced by Senator Dunn**

(Principal coauthor: Assembly Member Koretz)

February 20, 2004

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An act to amend Sections 17537.3, 22952, 22956, 22958, and 22963 of, and to add Section 22964 to, the Business and Professions Code, and to amend Section 308 of the Penal Code, relating to tobacco.

LEGISLATIVE COUNSEL'S DIGEST

SB 1821, as amended, Dunn. Tobacco products: minimum legal age: advertising, display, and distribution limitations.

(1) Existing law prohibits a person from making various promotional or advertising offers of smokeless tobacco products without taking actions to ensure that the product is not available to persons under 18 years of age.

This bill would extend the applicability of those provisions to persons under 21 years of age, except those born before January 1, ~~1986~~ 1987.

(2) The Stop Tobacco Access to Kids Enforcement (STAKE) Act is designed to reduce the availability of tobacco products to minors through sales restrictions and enforcement activities. The act, among other things, prohibits the furnishing of tobacco products to, and the purchase of tobacco products by, a person under the age of 18 years, authorizes the assessment of civil penalties of a violation of the act, and makes the violation of certain provisions of the act a criminal offense. Existing law also makes it a crime to engage in activities for which civil penalties may be imposed under the act.

This bill would extend the applicability of the act and the criminal law described above to persons under the age of 21 years, except for those who were born before January 1, ~~1986~~ 1987. Because the bill would change the definition of a crime, it would impose a state-mandated local program.

(3) The act requires the State Department of Health Services to conduct random, onsite sting inspections at retail sites, and requires the department to enlist the assistance of persons who are 15 and 16 years of age for this purpose.

This bill would, instead, authorize the department, until January 1, 2007, to enlist the assistance of persons who are 15 and 16 years of age, and, on and after January 1, 2007, to enlist the assistance of persons under 21 years of age, for these inspections.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. The Legislature finds and declares the  
2 following:

3 (a) Tobacco kills 480,000 Americans every year, causing more  
4 deaths than AIDS, alcohol abuse, illegal drug use, auto accidents,  
5 firearms accidents, fires, homicides, and suicides combined.

6 (b) Youth smoking has been identified as one of the most  
7 serious health care problems, and beginning to smoke as an  
8 adolescent is the primary cause of a lifetime smoking addiction.

9 (c) Three states, Alabama, Alaska, and Utah, have raised the  
10 minimum legal age for smoking above that required by California.

11 (d) Increasing the legal minimum sale age for tobacco will  
12 reduce the number of older youth who smoke and will help reduce  
13 sales of tobacco to younger children.

14 (e) Studies and surveys have shown that when states increased  
15 the legal minimum sale age for alcohol, drinking by high school

1 seniors fell by over one-third and daily drinking in the same group  
2 fell more than 50 percent.

3 (f) According to a United States Surgeon General report,  
4 smokers have sampled cigarettes at the median age of 14 years, but  
5 did not begin to smoke daily until the age of 18 years, and a small  
6 percentage began smoking after the age of 21 years.

7 (g) According to the American Lung Association,  
8 approximately 90 percent of smokers begin smoking before the  
9 age of 21 years, and those who begin smoking at an early age are  
10 more likely to develop a severe level of addiction to nicotine than  
11 those who start at a later age.

12 (h) The legal minimum sale age for alcohol in California is 21  
13 years of age, and persons under 21 years of age have visibly  
14 different drivers' licenses. Raising the legal minimum age  
15 required to purchase tobacco would ease the ability of merchants  
16 and vendors to check identification and would establish a uniform  
17 age for the purchase of both of these legal drugs.

18 (i) The state should continue its commitment to vigorous  
19 antitobacco education efforts and strict enforcement of existing  
20 laws limiting access by youth to tobacco products.

21 (j) It is in the interest of the public health to prevent adolescents  
22 from taking up the deadly habit of smoking in order to prevent their  
23 addiction to nicotine later in life.

24 SEC. 2. Section 17537.3 of the Business and Professions  
25 Code is amended to read:

26 17537.3. The following acts are prohibited:

27 (a) For a person to make, as part of an advertising plan or  
28 program, a promotional offer of a smokeless tobacco product that  
29 requires proof of purchase of a smokeless tobacco product unless  
30 that product carries a designation that the offer is not available to  
31 any person under the age of 21 years. Each promotional offer shall  
32 include in any mail-in coupon a statement requesting purchasers  
33 to verify that the purchaser is 21 years of age or older.

34 (b) For a person to honor a mail-in or telephone request for a  
35 promotional offer of a smokeless tobacco product, unless  
36 appropriate efforts are made to ascertain that a purchaser is over  
37 21 years of age. For purposes of this subdivision, appropriate  
38 efforts to ascertain the age of a purchaser include, but are not  
39 limited to, requests for a purchaser's birth date.

(c) For a person by any means, as part of an advertising plan or program, to distribute a free sample of a smokeless tobacco product within a two block radius of any premises or facilities whose primary purpose is directed toward persons under the age of 21 years, including, but not limited to, schools, clubhouses, and youth centers, when those premises are being used for their primary purposes.

(d) For a person to distribute, as part of an advertising plan or program, an unsolicited sample of a smokeless tobacco product through a mail campaign.

(e) This section may not be construed to prohibit a promotional offer of a smokeless tobacco product, the honoring of that promotional offer, or the distribution of samples, to a person who was born before January 1, ~~1986~~ 1987.

SEC. 3. Section 22952 of the Business and Professions Code is amended to read:

22952. The State Department of Health Services shall do all of the following:

(a) Establish and develop a program to reduce the availability of tobacco products to persons under 21 years of age through the enforcement activities authorized by this division.

(b) Establish requirements that retailers of tobacco products post conspicuously, at each point of purchase, a notice stating that selling tobacco products to anyone under 21 years of age is illegal and subject to penalties unless otherwise specified by law. The notice shall also state that the law requires that all persons selling tobacco products check the identification of any purchaser of tobacco products who reasonably appears to be under 21 years of age. The notice shall include a toll-free telephone number to the department for persons to report unlawful sales of tobacco products to any person under 21 years of age who was not born before January 1, ~~1986~~ 1987.

(c) Provide that the primary responsibility for enforcement of this division shall be with the department. In carrying out its enforcement responsibilities, the department shall conduct random, onsite sting inspections at retail sites and shall, subject to the limitations established in this subdivision, enlist the assistance of persons who are younger than the legal age to purchase cigarettes and tobacco products. Until January 1, 2007, the department may enlist the assistance of persons who are 15 and 16

years of age in conducting these enforcement activities. On and after January 1, 2007, the department may enlist the assistance of persons who are under 21 years of age in conducting these enforcement activities. The department may conduct onsite sting inspections in response to public complaints or at retail sites where violations have previously occurred, and may investigate illegal sales of tobacco products to any person under 21 years of age by telephone, mail, or the Internet. Participation in these enforcement activities by a person under 21 years of age shall not constitute a violation of subdivision (b) of Section 308 of the Penal Code for the person under 21 years of age, and the person under 21 years of age is immune from prosecution under that section, or under any other provision of law prohibiting the purchase of these products by a person under 21 years of age.

(d) In accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the department shall adopt and publish guidelines for the use of persons under 21 years of age in inspections conducted pursuant to subdivision (c) that shall include, but not be limited to, all of the following:

(1) The department and any local law enforcement agency under an enforcement delegation contract with the department may use persons under 21 years of age in random inspections to determine if sales of cigarettes or other tobacco products are being made to persons under 21 years of age.

(2) A photograph or video recording, pursuant to this section, of the person under 21 years of age shall be taken prior to each inspection or shift of inspections and retained by the department or the local law enforcement agency under an enforcement delegation contract with the department for purposes of verifying appearances.

(3) The department or a local law enforcement agency under an enforcement delegation contract with the department may use video recording equipment when conducting the inspections to record and document illegal sales or attempted illegal sales.

(4) The person under 21 years of age, if questioned about his or her age, need not state his or her actual age but shall present a true and correct identification if verbally asked to present it. Any failure on the part of the person under 21 years of age to provide

1 true and correct identification, if verbally asked for it, shall be a  
2 defense to any action pursuant to this section.

3 (5) The person under 21 years of age shall be under the  
4 supervision of a regularly employed peace officer during the  
5 inspection.

6 (6) All persons under 21 years of age used in this manner by the  
7 department or a local law enforcement agency under an  
8 enforcement delegation contract with the department shall display  
9 the appearance of a person under 21 years of age. It shall be a  
10 defense to any action under this division that the person's  
11 appearance was not that which could be generally expected of a  
12 person under 21 years of age, under the actual circumstances  
13 presented to the seller of any cigarette or other tobacco product at  
14 the time of the alleged offense.

15 (7) Following the completion of the sale, the peace officer  
16 accompanying the person under 21 years of age shall reenter the  
17 retail establishment and inform the seller of the random inspection.  
18 Following an attempted sale, the department shall notify the retail  
19 establishment of the inspection.

20 (8) Failure to comply with the procedures set forth in this  
21 subdivision shall be a defense to any action brought pursuant to  
22 this section.

23 (e) Be responsible for ensuring and reporting the state's  
24 compliance with Section 1926 of Title XIX of the federal Public  
25 Health Service Act (42 U.S.C. 300x-26) and any implementing  
26 regulations adopted in relation thereto by the United States  
27 Department of Health and Human Services. A copy of any report  
28 pursuant to this subdivision shall be made available to the  
29 Governor and the Legislature.

30 (f) Provide that any civil penalties imposed pursuant to Section  
31 22958 shall be enforced against the owner or owners of the retail  
32 business and not against the employees of the business.

33 SEC. 4. Section 22956 of the Business and Professions Code  
34 is amended to read:

35 22956. A person engaging in the retail sale of a tobacco  
36 product shall check the identification of a tobacco purchaser in  
37 order to ascertain the age of the purchaser, if the purchaser  
38 reasonably appears to be under 21 years of age.

39 SEC. 5. Section 22958 of the Business and Professions Code  
40 is amended to read:

22958. (a) The department may assess civil penalties against a person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under the age of 21 years, except a person born before January 1, ~~1986~~ 1987, any tobacco, cigarette, or cigarette papers, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, a product prepared from tobacco, or any controlled substance, according to the following schedule: (1) a civil penalty of from two hundred dollars (\$200) to three hundred dollars (\$300) for the first violation, (2) a civil penalty of from six hundred dollars (\$600) to nine hundred dollars (\$900) for the second violation within a five-year period, (3) a civil penalty of from one thousand two hundred dollars (\$1,200) to one thousand eight hundred dollars (\$1,800) for a third violation within a five-year period, (4) a civil penalty of from three thousand dollars (\$3,000) to four thousand dollars (\$4,000) for a fourth violation within a five-year period, or (5) a civil penalty of from five thousand dollars (\$5,000) to six thousand dollars (\$6,000) for a fifth or subsequent violation within a five-year period.

(b) The department shall assess penalties in accordance with the schedule set forth in subdivision (a) against any person, firm, or corporation that sells, offers for sale, or distributes a tobacco product from a cigarette or tobacco products vending machine, or against any person, firm, or corporation that leases, furnishes, or services these machines in violation of Section 22960.

(c) The department shall assess penalties in accordance with the schedule set forth in subdivision (a) against any person, firm, or corporation that advertises or causes to be advertised a tobacco product on an outdoor billboard in violation of Section 22961.

(d) If a civil penalty has been assessed pursuant to this section against a person, firm, or corporation for a single, specific violation of this division, the person, firm, or corporation may not be prosecuted under Section 308 of the Penal Code for a violation based on the same facts or specific incident for which the civil penalty was assessed. If a person, firm, or corporation has been prosecuted for a single, specific violation of Section 308 of the Penal Code, the person, firm, or corporation may not be assessed a civil penalty under this section based on the same facts or specific incident upon which the prosecution under Section 308 of the Penal Code was based.



(e) (1) In the case of a corporation or business with more than one retail location, to determine the number of accumulated violations for purposes of the penalty schedule set forth in subdivision (a), violations of this division by one retail location may not be accumulated against any other retail location of that same corporation or business.

(2) In the case of a retail location that operates pursuant to a franchise, as defined in Section 20001, violations of this division accumulated and assessed against a prior owner of a single franchise location may not be accumulated against a new owner of the same single franchise location for purposes of the penalty schedule set forth in subdivision (a).

(f) Proceedings under this section shall be conducted in accordance with Section 100171 of the Health and Safety Code.

SEC. 6. Section 22963 of the Business and Professions Code is amended to read:

22963. (a) The distribution or sale of tobacco products directly or indirectly to a person under the age of 21 years through the United States Postal Service or through any other public or private postal or package delivery service at locations, including, but not limited to, public mailboxes and mailbox stores, is prohibited.

(b) Any person selling or distributing tobacco products directly to a consumer in the state through the United States Postal Service or by any other public or private postal or package delivery service, including orders placed by mail, telephone, facsimile transmission, or the Internet, shall comply with the following provisions:

(1) (A) Before enrolling a person as a customer or distributing or selling the tobacco product through any of these means, the distributor or seller shall verify that the purchaser is 21 years of age or older. The distributor or seller shall attempt to match the name, address, and date of birth provided by the customer to information contained in records in a database of individuals whose age has been verified to be 21 years or older by reference to an appropriate database of government records kept by the distributor, a direct marketing firm, or other entity. The distributor or seller shall also verify that the billing address on the check or credit card offered for payment by the purchaser matches the address listed in the database.



(B) If the distributor or seller is unable to verify that the purchaser is 21 years of age or older pursuant to subparagraph (A), he or she shall require the customer to submit an age-verification kit consisting of an attestation signed by the customer that he or she is 21 years of age or older and a copy of a valid form of government identification. For the purposes of this section, a valid form of government identification includes a driver's license, state identification card, passport, an official naturalization or immigration document, such as an alien registration receipt card (commonly known as a "green card") or an immigrant visa, or military identification. The distributor or seller shall also verify that the billing address on the check or credit card provided by the consumer matches the address listed in the form of government identification.

(2) The distributor or seller shall impose a two-carton minimum on each order of cigarettes, and shall require payment for the purchase of any tobacco product to be made by personal check of the purchaser or the purchaser's credit card. No money order or cash payment may be received or permitted. The distributor or seller shall submit to each credit card acquiring company with which it has credit card sales identification information in an appropriate form and format so that the words "tobacco product" may be printed in the purchaser's credit card statement when a purchase of a tobacco product is made by credit card payment.

(3) The distributor or seller shall make a telephone call after 5 p.m. to the purchaser confirming the order prior to shipping the tobacco products. The telephone call may be a person-to-person call or a recorded message. The distributor or seller is not required to speak directly with a person and may leave a message on an answering machine or by voice mail.

(4) The distributor or seller shall deliver the tobacco product to the purchaser's verified billing address on the check or credit card used for payment. A product described under this section may not be delivered to a post office box.

(c) Notwithstanding subdivisions (a) and (b), if a distributor or seller complies with all of the requirements of this section and a person under the age of 21 years, except a person born before January 1, ~~1986~~ 1987, obtains a tobacco product by any of the

1 means described in subdivision (b), the seller or distributor is not  
2 in violation of this section.

3 (d) For the purposes of the enforcement of this section pursuant  
4 to Section 22958, the acts of the United States Postal Service or  
5 other common carrier when engaged in the business of  
6 transporting and delivering packages for others, and the acts of a  
7 person, whether compensated or not, who transports or delivers a  
8 package for another person without any reason to know of the  
9 package's contents, are not unlawful and are not subject to civil  
10 penalties.

11 (e) (1) For the purposes of this section, a "distributor" is a  
12 person or entity, within or outside the state, who agrees to  
13 distribute tobacco products to a customer within the state. The  
14 United States Postal Service or any other public or private postal  
15 or package delivery service is not a distributor within the meaning  
16 of this section.

17 (2) For the purpose of this section, a "seller" is a person or  
18 entity, within or outside the state, who agrees to sell tobacco  
19 products to a customer within the state. The United States Postal  
20 Service or any other public or private postal or package delivery  
21 service is not a seller within the meaning of this section.

22 (3) For the purpose of this section, a "carton" is a package or  
23 container that contains 200 cigarettes.

24 (f) A district attorney, city attorney, or the Attorney General  
25 may assess civil penalties against a person, firm, corporation, or  
26 other entity that violates this section, according to the following  
27 schedule:

28 (1) A civil penalty of not less than one thousand dollars  
29 (\$1,000) and not more than two thousand dollars (\$2,000) for the  
30 first violation.

31 (2) A civil penalty of not less than two thousand five hundred  
32 dollars (\$2,500) and not more than three thousand five hundred  
33 dollars (\$3,500) for the second violation.

34 (3) A civil penalty of not less than four thousand dollars  
35 (\$4,000) and not more than five thousand dollars (\$5,000) for the  
36 third violation within a five-year period.

37 (4) A civil penalty of not less than five thousand five hundred  
38 dollars (\$5,500) and not more than six thousand five hundred  
39 dollars (\$6,500) for the fourth violation within a five-year period.

(5) A civil penalty of ten thousand dollars (\$10,000) for a fifth or subsequent violation within a five-year period.

SEC. 7. Section 22964 is added to the Business and Professions Code, to read:

22964. The provisions of this division may not be construed to prohibit a city or county from enacting laws with respect to the legal age to purchase or possess a tobacco product as long as they are at least as stringent as state law.

SEC. 8. Section 308 of the Penal Code is amended to read:

308. (a) (1) Every person, firm, or corporation that knowingly, or under circumstances in which it has knowledge or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to another person who is under the age of 21 years, except for a person born before January 1, ~~1986~~ 1987, any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, any product prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense.

(2) Notwithstanding Section 1464 or any other provision of law, 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the office of the city attorney, county counsel, or district attorney who is responsible for bringing the successful action, and 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the city or county for the administration and cost of the community service work component provided in subdivision (b).

(3) Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence of majority shall be a defense to any action brought pursuant to this subdivision. Evidence that a person is 21 years of age or older or was born before January 1, ~~1986~~ 1987, may be a facsimile of or a reasonable likeness of a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective

1 Service Act, or an identification card issued to a member of the  
2 Armed Forces indicating the person is 21 years of age or older or  
3 was born before January 1, ~~1986~~ 1987.

4 (4) For purposes of this section, the person liable for selling or  
5 furnishing tobacco products to a person under the age of 21 years  
6 or a person born on or after January 1, ~~1986~~ 1987, by a tobacco  
7 vending machine shall be the person authorizing the installation or  
8 placement of the tobacco vending machine upon premises he or  
9 she manages or otherwise controls and under circumstances in  
10 which he or she has knowledge, or should otherwise have grounds  
11 for knowledge, that the tobacco vending machine will be utilized  
12 by a person under the age of 21 years or a person born on or after  
13 January 1, ~~1986~~ 1987.

14 (b) Every person under the age of 21 years, except for a person  
15 born before January 1, ~~1986~~ 1987, who purchases, receives, or  
16 possesses any tobacco, cigarette, or cigarette papers, or any other  
17 preparation of tobacco, or any other instrument or paraphernalia  
18 that is designed for the smoking of tobacco, any product prepared  
19 from tobacco, or any controlled substance shall, upon conviction,  
20 be punished by a fine of seventy-five dollars (\$75) or 30 hours of  
21 community service work.

22 (c) Every person, firm, or corporation that sells or deals in  
23 tobacco or any preparation thereof, shall post conspicuously, and  
24 keep so posted in his, her, or their place of business, at each point  
25 of purchase, the notice required pursuant to subdivision (b) of  
26 Section 22952 of the Business and Professions Code, and any  
27 person failing to do so shall, upon conviction, be punished by a fine  
28 of ten dollars (\$10) for the first offense and fifty dollars (\$50) for  
29 each succeeding offense, or by imprisonment for not more than 30  
30 days.

31 (d) For purposes of determining the liability of a person, firm,  
32 or corporation controlling franchises or business operations in  
33 multiple locations, for the second and subsequent violations of this  
34 section, each individual franchise or business location shall be  
35 deemed a separate entity.

36 (e) It is the Legislature's intent to regulate the subject matter of  
37 this section. As a result, no city, county, or city and county may  
38 adopt an ordinance or regulation inconsistent with this section.

39 (f) Notwithstanding any other provision of this section, the  
40 Director of Corrections may sell or supply tobacco and tobacco

1 products, including cigarettes and cigarette papers, to any person  
2 confined in any institution or facility under his or her jurisdiction  
3 who has attained the age of 16 years, if the parent or guardian of  
4 the person consents thereto, and may permit smoking by the person  
5 in any institution or facility. No officer or employee of the  
6 Department of Corrections shall be considered to have violated  
7 this section by any act authorized by this subdivision.

8 SEC. 9. No reimbursement is required by this act pursuant to  
9 Section 6 of Article XIII B of the California Constitution because  
10 the only costs that may be incurred by a local agency or school  
11 district will be incurred because this act creates a new crime or  
12 infraction, eliminates a crime or infraction, or changes the penalty  
13 for a crime or infraction, within the meaning of Section 17556 of  
14 the Government Code, or changes the definition of a crime within  
15 the meaning of Section 6 of Article XIII B of the California  
16 Constitution.

